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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954
No. 120

JEREMIAH REEVES, JR.,
Petitioner,

v.

STATE OF ALABAMA
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

The argument in the reply brief shall follow the sequence of argument used in petitioner's and respondent's briefs.

I

A.

The "confessions" which were introduced into evidence had been coerced.

Respondent's brief nowhere challenges that petitioner was subjected to unconstitutional coercion at Kilby. Instead, it rests on assertions that (a) the inculpatory statements were not exacted in the course of "formal" questioning, (b) that the statements and the coercion occurred in different places, and (c) that in one instance the questioning was by a psychiatrist and the police were not

present. It ignores the reality of petitioner's age (17), race (Negro), education (8th grade) and emotional instability, the duration and character of the threats and promises made in the presence of the electric chair, the crime of which he was accused, the effect of already having succumbed to pressure to the extent of making a "confession" (which the State did not offer into evidence), the very short time between the coercion at Kilby and the statements made at the City Jail, the fact that petitioner was still incommunicado, the continued presence of the police [1] and other factors.[2]

Formality of interrogation has no relationship to the requirements of the Fourteenth Amendment and petitioner has difficulty in finding a case where this Court found unconstitutional coercion in which the interrogation could be characterized as "formal". As to the gap of time and place, Kilby and the City Jail are only a fifteen minute automobile ride apart (R. 140); there was the gap of but an hour or so between the first inculpatory statement following the coercion and the statements at the City Jail. Indeed, petitioner's trip from Kilby to the City was but a continuation of his treatment at Kilby—with no respite—for he was taken into town only to be identified and to repeat what he may have said at Kilby.

There is no evidence that at any time any of the coercive influences upon petitioner were alleviated.[3] The State produced nothing and now merely asks this Court to accept its speculation.

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[1] These factors are discussed in detail and the record concerning them is thoroughly canvassed in petitioner's brief, pp. 19-21, 22.

[2] As pointed out in petitioner's brief, while at Kilby he was stripped, photographed, his blood was tapped and spinal fluid was taken from him.

[3] The only change, which loses significance when considered along with all the other factors, is that his parents were permitted to see him at 5:00 p. m., Wednesday following the statements at the City Jail and prior to the statements to Clark and Dr. Bazar.

Lyons v. *Oklahoma*, 322 U. S. 596, the case upon which respondent relies was completely unlike the one now at bar. Lyons was a completely different type of person from petitioner and his treatment differed in significant respects: He was a married man over twenty-one years of age. This Court explicitly noted that it did not appear that he was uneducated or of subnormal intelligence. In addition it did not appear, as it does in this case, that the defendant was emotionally unstable. Lyons had already served a term in the State penitentiary. He had not been held incommunicado—his family had actually visited him prior to his having confessed. The time gap between the coerced first confession and the second confession was from 2:30 a. m. until between 8:00 p. m. and 11:00 p. m. of the same day. Morever, this Court in the *Lyons* case took occasion to point out that the confession was made before a person whom Lyons had reason to trust.

B.

Even if they were not coerced, the confession issue was not fairly tried and reviewed.

In answer to point IB respondent merely avers that the trial judge had discretion to pass upon the admissibility of the inculpatory statements as a *preliminary* matter. Even if this general assertion were true in the context of this case, it is apparently conceded that the jury had the right and duty to pass upon at least the weight to be accorded the confessions. They were so instructed (Brief of respondents, p. 20). There is not a jurisdiction which would deny to the jury this right and duty. (See, petitioner's brief, pp. 25-26). But, here the jury heard confessions and heard of them, and was not permitted to hear relevant and weighty evidence indicating that crucial testimony—the confessions—were unconstitutionally coerced and utterly untrustworthy. Indeed, the trial judge himself was unable to fairly pass upon petitioner's motion that the confessions be excluded, for he heard only proffers, and refused to hear the testimony of witnesses.

And it should be particularly noted that respondent completely ignores that prosecutrix testified before the jury concerning the typewritten confession which was handed to her upon her arrival at the City Jail. Concerning this confession it is not and cannot seriously be contended that there was a hiatus which renders irrelevant the coercion inflicted at Kilby.

C.

Respondent misinterprets *Stein* v. *New York*.

Petitioner submits that respondent has not addressed itself to the issue of whether *Stein* v. *New York* was properly interpreted by the courts below apart from making a bare assertion to that effect. Instead respondent merely reiterates that petitioner was proven guilty apart from the alleged confessions. That the conviction rests on nothing but the confessions and their fruits was demonstrated in petitioner's brief (p. 30, fn. 34). That the *Stein* case is inapplicable was likewise shown (Petitioner's brief, pp. 30-32). Petitioner submits that the rule proposed by respondent could not be adopted in any civilized country at this stage of history. Petitioner would merely like to add some words by Chief Justice Stone in *Hill* v. *Texas*, 316 U. S. 400, 406 which although it dealt with discrimination in jury selection, are pertinent here:

> ". . . no state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution . . . forbid(s). Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. . . . It is the state's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the state's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees.

> . . . [I]n this case . . . the conviction cannot stand because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous."

II

There was systematic exclusion of Negroes from jury panels in Montgomery County.

On the question of systematic exclusion of Negroes from the jury, respondent does not challenge any statement of the facts by petitioner. However, respondent makes assertions of fact that have no support anywhere in the Record.[4] Respondent states that Judge Carter ". . . testified that the jury commission has for the past several years regularly solicited the names of Negro citizens from Negro clubs and other sources in an effort to select and qualify as many Negro citizens as possible for jury service" (Brief of respondents, p. 23). No such testimony is in the Record. In fact, although Judge Carter testified that he "once went to the (Negro) clubs" (R. 28), he later flatly asserted, "I never go to the Negro clubs. The ones I have asked to help me have been somebody I know, Negroes I know" (R. 33). And he said "I don't go in them. I do know—this is way, way back—I do know one club. We had several members out of that club. In fact,

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[4] Respondent does not, in referring to the Record in this section of its brief accompany its references with a specific Record page number. It merely sets forth the pages within which the testimony of the witnesses to whom it refers appears *e. g.*, "Judge Carter's testimony (R. 28-36)", Judge Jones' testimony "(R. 37-39)". Brief of respondents pages 23 and 24.

we had at least twenty out of the club. That is when that meets in an insurance office. They call it the Montgomery Improvement Association or Society. It might be the Atlanta Insurance Company . . ." (R. 33-34).[5]

This is the antithesis of "regularly solicit(ing) the names of Negro citizens from Negro clubs. . . ."

Respondent asserts that Judge Carter testified that names of Negroes were obtained from "other sources" (Brief p. 23). In fact he testified: "The ones I have asked to help me have been somebody I know, Negroes I know" (R. 33). And he also testified: "It is particularly hard for us to put in Negroes without knowing them" (R. 29). Thus the "other sources" are merely the personal contacts which petitioner assailed in his brief, a method which had to lead to the shocking and disproportionately small participation of Negroes on juries in Montgomery County.

Respondent states that the Clerk of the Court, John R. Matthews, testified "that the jury commissioners have regularly secured the names of Negroes qualified for jury service from Negro churches and labor organizations" (Brief p. 24). Petitioner has been unable to find such testimony anywhere in the record. Witness Matthews did testify that "I have asked different members of the Negro race about names for the jury box" (R. 36), although it does not appear that any of such persons furnished lists (R. 36-37). He further testified "It is not because we have tried to leave them out, it is because we just don't know everybody" (R. 37). This confirms Judge Carter's testimony that jurors were chosen on the basis of personal contact. But if the Alabama statute were followed (See petitioner's brief, p. 33), and registration and tax lists were consulted along with city directories and telephone

[5] Upon the occasion of this testimony petitioner was denied a motion to examine the names in the jury box to test this assertion of the commissioner (R. 34).

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directories the commissioners would not have to "know them" (Negroes) or "know everybody."

If Negroes and whites were selected for jury service on the same basis, and if no partiality necessarily stemmed from the method of selection, one would expect that the proportion of Negroes serving on juries would approximate the proportion of Negroes in the population.[6] This is not to say that racial proportional representation is what the Constitution requires. Such a method of selection, dependent upon race, is as constitutionally abhorrent as systematic exclusion based upon race. But a vast discrepancy between the proportion of Negroes in the population and on jury panels naturally raises the question of the reason for the difference. In *Brown* v. *Allen*, 344 U. S. 443, 472, it was accounted for by the difference in the number of Negroes and whites on tax lists from which jurors were chosen, which was explainable by "inequality of educational and economic opportunities" *Id.* at 473. In *Cassell* v. *Texas*, 339 U. S. 282, 285-286, there was a discrepancy explainable by the composition of the voting lists (which contained only names of poll-tax payers and which was therefore subject to the influence of the economic and educational factors operative in *Brown* v. *Allen*).

In this case, not only is the disproportion far greater than in either of the above cases, but it is not explainable by the application of any reasonable standard. Respondent's brief, page 5 set forth the pertinent statute which requires that the commissioners must place on the roll

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[6] In this connection, petitioner desires to point out that the disproportion is not merely between 8.5% Negroes on jury panels and 43.6% Negroes in population as even respondent concedes, but is more severe; the 8.5% represents an optimum figure. No panel has had more than 3 Negroes on it, but at least some have had fewer or none. For the detailed arithmetic see petitioner's brief (p. 34, fn. 39).

"the names of all male citizens"—honesty, intelligence, integrity, good character, sound judgment are required; jurors should be free of physical infirmity, may not be habitual drunkards, and must be free of moral turpitude. Inability to read English is excusable. It is to be presumed, petitioner submits, that Negroes are as qualified as whites under these standards. *Hill* v. *Texas*, 316 U. S. 400, 404.

Respondent's only effort to explain the huge differential is a suggestion that it may be explainable by the statute specifying persons who may be exempted from jury service set forth on page 4 of respondent's brief (Respondent's brief, pp. 26-27). Apart from the fact that this statute appears only to *excuse* persons from jury duty, and not from having their names placed on the rolls, petitioner submits that such an argument is frivolous for the very reasons by which this Court found reasonable the disproportion in the *Cassell* and *Brown* cases. Economic and educational factors would tend to reduce the proportion of whites, not Negroes, on jury panels. Exemptions may be obtained by judges, lawyers, officers of the federal and state governments, members of various professions such as doctors, and lawyers, engineers and operators of various modes of transportation; newspaper and radio men, etc. It certainly can hardly be contended that more than five times more Negroes than white persons are engaged in these pursuits in Montgomery County, Alabama.

III

Exclusion of the general public denied due process of law and was substantially related to petitioner's opportunity to defend.

Respondent's brief, Point III avers that the trial was in fact public because "a few newspaper reporters" were present (Brief, p. 32); the testimony was stenographically transcribed (Brief, p. 33); court officials and lawyers were in the courtroom; and petitioner's relatives were permitted to attend. Respondent further avers that petitioner's main reliance is on *re Oliver*, 333 U. S. 257 and analyzes that case in detail to show that the facts there were in many respects different from those in the instant case.

However, petitioner's reliance upon *re Oliver* extends only to the point which respondent concedes it represents: a criminal trial in order to afford due process of law must be public. Petitioner submits that the meaning of the word "public" was not definitively established in the *Oliver* case and that those who were permitted to attend petitioner's trial did not constitute the "public". To more precisely define the public trial requirement petitioner has surveyed practice, legislation and judicial decisions throughout the United States and the English speaking world (See Brief of Petitioner, pp. 42-46) which clearly show that the access of the *general* public to a trial may be curtailed only up to a certain point—after which a trial can no longer be termed public.

That limit is transgressed by *unreasonable* exclusion, exclusion not reasonably related to the sound and fair administration of justice. Therefore there are cases in which the public has properly been excluded following a disturbance in the courtroom, or during the testimony of prosecutrix who may be too embarrassed to testify, or during the testimony of a witness who fears revenge; simi-

larly children may be excluded. In only a few isolated instances has a blanket exclusion of the general public throughout a trial been upheld over a defendant's objection. The cases are discussed and developed at length in petitioner's brief, pp. 42-46.

Most of the cases cited in respondent's brief, p. 36, fn. 23, to support a textual assertion that the general public may be excluded throughout a trial either afford no such support or uphold petitioner's position. Thus, *Reagan* v. *U. S.*, 202 F. 488 (C. A. 9th, 1913), has been overruled or completely stripped of vitality by *Tanksley* v. *U. S.*, 145 F. 2d 58 (C. A. 9th, 1944). *Sawyer* v. *Duffy*, 60 Fed. Supp. 852 (D. C. Cal. 1945), if it can be said to contain any holding on the merits at all, is based upon (a) the *Reagan* case, *supra*, (b) *Callahan* v. *U. S.*, 240 Fed. 683 (C. A. 9th, 1917), which received the same treatment in the *Tanksley* case as did the *Reagan* case, and (c) *People* v. *Swafford*, 65 Cal. 223, 3 Pac. 809 (1884), discussed *infra*, which has been overruled. *People* v. *Swafford*, has been overruled by *People* v. *Hartman*, 103 Cal. 242, 37 Pac. 153 (1894). *Keddington* v. *State*, 19 Ariz. 457, 172 Pac. 273 (1918), was a case where there was no objection to the exclusion there practiced. *Benedict* v. *People*, 23 Colo. 126, 46 Pac. 637 (1896), was a case in which defendant did not object. *Moore* v. *State*, 151 Ga. 648, 108 S. E. 46 (1921), was a case which involved exclusion only during the testimony of prosecutrix. *Baker* v. *Utecht*, 161 F. 2d 304 (C. A. 8th, 1947), was a case which involved exclusion only during the testimony of prosecutrix. *State* v. *Callahan*, 100 Minn. 63, 110 N. W. 342 (1907), was a case involving exclusion only during the testimony of prosecutrix.

Only *Commonwealth* v. *Blondin*, 324 Mass. 564, 87 N. E. 2d 455 (1949), *Melanson* v. *O'Brien*, 91 F. 2d 963 (1st Cir., 1951), which was a habeas corpus proceeding collateral to the *Blondin* case, *Robertson* v. *State*, 64 Fla. 437, 16 So. 118 (1912) and *Sallie* v. *State*, 155 Miss. 547, 124 So. 650

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(1929), take the same position as respondent. These cases represent half of the small minority of jurisdictions which go to such an extreme. They have been discussed in petitioner's brief pp. 45-46 along with the overwhelming majority throughout the English speaking world which employs the procedure which petitioner has demanded as fundamental from the outset of the proceedings herein. Petitioner submits that the cases in these minority jurisdictions have either received only passing consideration or are largely based upon authority which has been overruled, or which does not go so far as respondent advocates. Thus *Robertson* v. *State*, relies on the *Swafford* case, *supra*, upon *Grimmett* v. *State*, 22 Tex. 36, 2 S. W. 631 (1886), which involved exclusion only during the testimony of a frightened prosecutrix and upon *People* v. *Hall*, 51 App. Div. 57, 64 N. Y. S. 433 (1900), a New York case of dubious vitality, see *People* v. *Jelke*, 130 N. Y. S. 2d 662 (1954).

Petitioner submits that by any test of due process of law the exclusion which was practiced in this case was violative of the Fourteenth Amendment. Of course none of the generally utilized approaches are mutually exclusive. They are all directed to the goal of ascertaining what constitutes basic fairness.

1. "What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Twining* v. *New Jersey*, 211 U. S. 78, 99. In England there was a clear right to a public trial at least as early as 1565 and at no time in English history does it appear that that right has been curtailed beyond a point advocated by petitioner here. Thus, Sir Thomas Smith

in his *De Republica Anglorum* wrote that the process of English justice of his day contemplated:

> "[e]vidence or writing being shewed, witnesses be heard and sworn before them not after the fashion of the Civil Law but openly that not only the judges but the parties and as many as may be present may hear what each witness does say."[7]

The English and Commonwealth cases are set forth in petitioner's brief on p. 45, fn. 55. This rule has been uniform for at least as long as recorded history discloses.

Colonial American practice does not appear to have been different. Early state constitutions required that defendant in criminal cases be afforded public trials.[8] It does not appear that in any state during colonial times either statutory or constitutional provisions abolished or in any way curtailed the right to a public trial as it was and is understood at English common law.

2. Another method of ascertaining due process of law is to examine the prevailing practice in the English speaking world. See *Wolf* v. *Colorado*, 338 U. S. 25, 28-29. This has been done in petitioner's brief, pp. 42-46, and it appears that almost uniformly the rule is the one which petitioner submits is the only permissible one.

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[7] Book 2, Ch. 15, p. 79 (Aleston's Ed'n.). To the same effect see Hale's *The History of the Common Law of England* (1716): "The excellency of this open course of evidence to the jury appears in these particulars * * * that it is public * * *" Ch. 12, p. 343. (Runnington's Ed'n. 1820). See also Blackstone's Commentaries Vol. 3, Ch. 23, p. 375 (Jones' Ed'n. 1915, p. 1983); Bentham's Treatise on Judicial Evidence, p. 522 (1827 ed'n.).

[8] Pennsylvania Constitution of 1776, Thorpe, American Charters, Constitutions and Organic Laws, Vol. 5, pp. 2783, 3083. North Carolina Constitution 1776, Id. at Vol. 4, p. 2455. Delaware Constitution of 1792, Id. at Vol. 7, p. 3113.

3. A third method is to ascertain whether the practice complained of offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Snyder* v. *Massachusetts*, 291 U. S. 97, 106. If the right to a public trial is—as it is conceded—fundamental, then of course it may not be curtailed except for exceedingly good reason shown and then only in the narrowest possible manner. Prevailing practice and reason informs us that the mere fact that a defendant is prosecuted for rape should not justify stripping him of this all-important safeguard. Indeed, in a case involving a charge of rape, which is one of the most difficult charges to defend, defendant *a fortiori* requires every constitutional guarantee. If the public had been excluded only during the testimony of prosecutrix, as petitioner has consistently urged, the general rule would have been satisfied, and the interests which the state sought to serve (shielding prosecutrix from embarrassment and the public from the recitation of the details of the rape) would have been reasonably protected. Exclusion beyond the point of utter necessity shocks a sense of justice.

To find that the practice complained of denies due process it must be shown that it "bears, or may be fairly assured to bear a relation, reasonably substantial to his opportunity to defend." *Snyder* v. *Massachusetts*, 291 U. S. 97, 106. That exclusion of the public bears such a relationship has not only been asserted by the cases and authorities from the earliest times, but in this case there is a specific instance of what the absence of the public means: Juror Page, the Chief of the Reserve Police Force was on the jury. It may be doubted that he ever would have been sworn and seated throughout the trial under the gaze of members of the general public, a reason for the public trial which is repeatedly set forth by the authorities.[9]

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[9] E.g. Blackstone, op. cit. *supra*, n. 7; *re Oliver*, 333 U. S. 257, 270; *Tanksley* v. *United States*, 145 F. 2d 58, 59 (C. A. 9th, 1944).

As to the Chief of Police of the Reserve Police Force of Montgomery, respondent in its brief asserts that "the court offered petitioner a hearing to prove the jury was biased (R. 172, 173); but counsel stated he had no evidence to offer but wished to question the juror (R. 173)" (Brief of respondent, p. 13). The only facts necessary to demonstrate the deleterious nature of the denial of the right to a public trial were conceded by the State when it admitted that Juror Page was a member of the Reserve Police Force, had worked on cases and that the State had knowledge of this. No further bias need have been shown to warrant a challenge for cause, and certainly there was information enough to warrant a peremptory challenge.[10] Thus the statement in respondent's brief is misleading.

CONCLUSION

Petitioner respectfully submits that for the reasons set forth herein and in petitioner's original brief the judgment below must be reversed.

Respectfully submitted,

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[10] See discussion of the authorities in petitioner's brief p. 48.

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BRIEF AND ARGUMENT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 120

JEREMIAH REEVES, JR.,

Petitioner

v.

STATE OF ALABAMA,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Alabama (R. 185) is reported at 260 Ala. 66, 68 So. 2d 14.

JURISDICTION

The judgment of the ~~Superior~~ Circuit Court of Montgomery County was affirmed by the Supreme Court of Alabama on August 6, 1953. Rehearing was denied November 27, 1953. Time for filing petition for writ of certiorari was extended to and including March 12, 1954 by order of the Chief Justice dated February 17, 1954. Petition for writ of certiorari and motion for leave to proceed in *forma pauperis*

were granted on June 7, 1954. The jurisdiction of this Court was invoked under 28 U. S. C. § 1527(3), petitioner having asserted in the courts below rights, privileges and immunities conferred by the Constitution of the United States.

QUESTIONS PRESENTED

I.

A.

Whether the confessions or inculpatory statements which the State was allowed to introduce in evidence were coerced and involuntary, depriving petitioner of due process of law under the Fourteenth Amendment.

B.

Whether the trial court committed reversible error in refusing to permit petitioner to introduce evidence of events which occurred before the confessions or inculpatory statements were made, in a different place and before different persons, in order to show that they were coerced and involuntary.

C.

Whether the Supreme Court of Alabama committed reversible error in its application of *Stein v. New York*, to the instant case.

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II.

Whether there was systematic exclusion of Negroes by reason of their race, creed or color from the jury panels of Montgomery County, Alabama, where the jury commissioners made diligent efforts to procure the names of Negroes for jury duty, but where the jury panels contained a smaller proportion of Negroes to whites, than there were Negroes to whites in the community.

III.

Whether the petitioner was denied due process of law, where under authority of Article 6, Section 169, Alabama Constitution of 1901, and Title 15, Section 320, Code of Alabama 1940, the general public was excluded from the courtroom, although members of the press, petitioner's family, a stenographer to assist petitioner, members of the bar, jurors, witnesses and court officials were allowed to remain.

STATUTES INVOLVED

In addition to those set out in Petitioner's Brief, pages 3 and 4.

Title 30, Section 3, Code of Alabama 1940, as amended by Act No. 243, General Acts of 1943, page 197.

> The following persons are exempt from jury duty, unless by their own consent: Judges of the several courts; attorneys at law during the time they practice their profession; officers of the United States; officers of the executive department of the state government; sheriffs and their deputies; clerks of the courts and county commissioners; regularly licensed and practicing physicians; dentists; pharmacists; optometrists; teachers while actually engaged in teaching; actuaries while actually engaged in their profession; officers and regularly licensed engineers of any boat plying the waters of this state; passenger bus driver-operators, and driver-operators of motor-vehicles hauling freight for hire under the supervision of the Alabama public service commission; railroad engineers, locomotive firemen, conductors, train dispatchers, bus dispatchers, railroad station agents, and telegraph operators when actually in sole charge of an office; newspaper reporters while engaged in the discharge of their duties as such; regularly licensed embalmers while actually engaged in their profession; radio

broadcasting engineers and announcers when engaged in the regular performance of their duties; the superintendents, physicians, and all regular employees of the Bryce hospital in Tuscaloosa county and the Searcy hospital in Mobile county; officers and enlisted men of the national guard and naval militia of Alabama, during their terms of service; and convict and prison guards while engaged in the discharge of their duties as such.

Title 30, Section 21, Code of Alabama 1940, as amended by Act No. 325, General Acts of 1943, page 309.

The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or house holder his name may be placed on the jury roll and in the jury box. No person over the age

of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so.

STATEMENT OF THE FACTS

I THE COMMISSION OF THE CRIME

On July 28, 1952, the prosecutrix, Mrs. Mabel Ann Crowder, was residing on Cleveland Avenue in a quiet residential section of the City of Montgomery, in Montgomery County, Alabama (R. 52). She was a married white woman. At about 12:15 P.M. o'clock on that date she was at home and was alone. She was partly undressed and was sitting in her bedroom taking down her hair. She was sitting before her dresser. She looked up and into the mirror of her dresser and saw the petitioner, a seventeen-year-old Negro, standing in the doorway of her bedroom (R. 60). She was frightened and surprised, and ordered him out of her house, but he jumped towards her and grabbed her by the throat and arm. She screamed and struggled in an unsuccessful effort to protect herself from his assault (R. 60).

The petitioner, after struggling with prosecutrix, forced her to remove part of her underclothes. He then forced her onto a bed, and proceeded to have sexual intercourse with her against her will, and without her consent, holding her by the throat and arm while raping her (R. 61). The medical proof shows that there was both penetration and ejaculation (R. 81, 84).

Upon completion of his act the petitioner inquired of the victim whether she was going to report

the rape to the police, saying to her: "I ought to kill you." (R. 53). She promised not report the crime, provided he would leave her home immediately. The petitioner had demanded money and she had given him some money from her billfold. He then started beating her in the face and stomach, and she fell to the floor in a dazed and unconscious condition. Holding her by the hair, the petitioner then beat her head against the floor several times (R. 53, 66).

After petitioner left her home, the victim made her way to the house next door and was administered first aid treatment and the police were summoned by the neighbor at 12:40 P.M. o'clock (R. 52). The victim was in a severe state of shock, was extremely nervous, was hysterical, was crying, and was badly bruised and bleeding (R. 68). She informed her neighbor that she had been raped and beaten by a Negro male (R. 68), and she gave a description of her assailant which in major particulars conforms to the physical description of the petitioner (R. 68, 98). The victim was soon removed to an army hospital, where she remained for several days under examination and treatment (R. 69).

A medical examination of the prosecutrix was made immediately following the rape and upon her arrival at the Maxwell Air Force Base Hospital. This examination disclosed that there was present in her vagina positive male spermatozoa (R. 81, 84). The examination confirmed her statements to the effect that she recently had been attacked and forced to submit to sexual intercourse.

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At 1:00 P.M. o'clock on the date of the crime, the petitioner solicited and was given an automobile ride at a point two blocks north of the victim's home. Petitioner was running up the street towards Fairview Avenue, the victim's home being south and to his rear. He stopped a salesman, Mr. Wilmer Rucker Clark, Jr., and asked for a ride to town. Mr. Clark testified that the petitioner "was sweating profusely and smelled very loudly," although the petitioner was neatly dressed. He rode with Mr. Clark for several blocks and then left Mr. Clark's car at the intersection of Fairview and Cleveland Avenues, eight or nine blocks north of the scene of the crime. (R. 71-76).

II APPREHENSION AND ARREST

The petitioner was arrested by the Sheriff's deputies at 2:10 P.M. on Monday, November 10, 1952. After brief incarceration in the county jail, he was removed to the State Penitentiary, Kilby Prison, located on the outskirts of the City of Montgomery. He arrived at Kilby Prison at 3:00 P.M. o'clock, and was confined there until 11:00 A.M. o'clock on Wednesday, November 12, at which time he was taken to the police headquarters of the City of Montgomery, a distance of several miles from Kilby Prison. (R. 135-137).

At police headquarters in downtown Montgomery petitioner was confronted by the prosecutrix, Mrs. Mabel Ann Crowder, who asked him: "Why

did you do it?", in answer to which the petitioner shook his head and said: "I don't know." When the prosecutrix confronted the petitioner, police officers inquired of him: "Where do you remember her from?", in answer to which the petitioner said: "Cleveland Avenue, the first one." The petitioner admitted to Mrs. Crowder that he had entered her home by the rear door. It was clearly shown by the prosecution that no force, intimidation, threats, or coercion had been used against the petitioner during his detention at police headquarters, prior to his making the inculpatory statements aforesaid. After this interview at police headquarters, petitioner was returned to Kilby Prison. (R. 55, 57, 59).

During a psychiatric examination, made at Kilby Prison on November 13, and at the County Jail on November 20, the petitioner admitted to the psychiatrist that the petitioner had raped Mrs. Crowder and that he had had an ejaculation (R. 166). The petitioner testified on trial in his own defense. He denied having committed the offense (R. 142). He admitted that he had, on Wednesday, November 12, while detained at police headquarters, answered, "I don't know," when Mrs. Crowder had asked him why he had attacked her (R. 147). He testified that he would not have made such inculpatory statement had not law-enforcement officers threatened him while he was held in custody at Kilby Prison during the period of Monday, November 10, to Wednesday, November 12 (R. 147). He testified that on Monday he was questioned until about dark and was allowed to sleep a short while, where-

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upon a deputy prison warden woke him and took him into the room containing the electric chair. He testified that he and the deputy warden sat down and the deputy warden said to him: "The only thing that is going to keep you out of the electric chair, you are going to say you did it." (R. 135-138).

During the trial the prosecutrix positively identified the petitioner as the person who had entered her home and raped her on July 28, 1952 (R. 60).

III TRIAL

The trial of the defendant opened in the Circuit Court of Montgomery County, Alabama, on November 26, 1952. The court room was cleared by the Judge in accordance with the provisions of the Alabama Constitution of 1901, Section 169, and Title 15, Section 320, Code of Alabama 1940 (R. 10). The petitioner then moved the Court to permit the public to remain (R. 10); to allow a private stenographic reporter to remain (R. 11); to set aside the proceedings already had (R. 12); to quash the indictment (R. 12-14); to permit the public to remain (R. 14); to permit the relatives of the petitioner to remain (R. 14); to exclude the public only while the prosecutrix testifies (R. 15); to quash the venire for exclusion of Negroes (R. 15). All of the above motions, except the last, were overruled or denied.

On the motion to quash the venire for exclusion of Negroes, the Court stated that because he was a

member of the Jury Commission and would be a necessary witness, he would recuse himself and that a special judge would have to be appointed and the case continued until November 28 (R. 15, 16).

The defendant, his counsel and the State agreed upon James J. Carter, Esq., as Special Judge and an appointment to him was issued by the Governor of Alabama (R. 21).

On November 28th, the trial was resumed (R. 21, 22). Hearing on the defendant's motion to quash the venire for exclusion of Negroes was heard in the Judge's chambers at the request of Petitioner's counsel (R. 24). The members of the Jury Commission and others testified at length to the general effect that Negroes were not systematically excluded from the jury panels of Montgomery County (R. 24-43).

Trial was resumed in the Court Room and the jury qualified (R. 46-48). A struck jury was selected and sworn (R. 48). All witnesses for the State and the defendant were sworn and placed under the rule (R. 48). The Court then announced that in accordance with constitutional and statutory authority, the court room would be cleared of all persons except jurors, officials of the Court, law enforcement officers, members of the Bar, members of the Press and relatives of the accused (R. 48). The Court asked petitioner's counsel if he desired a private stenographer in accordance with his previous request and counsel stated that he did not (R.

49). The Court then proceeded to take testimony (R. 52).

After the evidence was presented and both the State and Defense had rested, petitioner moved for a mistrial because one juror had answered falsely on oral examination (R. 172). The Court offered Petitioner a hearing to prove the juror was biased (R. 172, 173); but counsel stated he had no evidence to offer, but wished to question the juror (R. 173). The Court ruled that the jury had been qualified under oath and would not be requalified (R. 173).

After argument by counsel and the Court's charge, the jury retired, and later returned a verdict of guilty and fixed petitioner's punishment at death. (R. 183).

BRIEF AND ARGUMENT

THE INCULPATORY STATEMENTS

I.

Certain inculpatory statements made by the petitioner were allowed in evidence over the objection of counsel for the petitioner. In the Montgomery Police Headquarters on November 12, 1952, the prosecuting witness confronted the petitioner and asked him, "Why did you do it?" Petitioner shook his head and said, "I don't know." (R. 59.) At a later meeting someone present asked the petitioner, "Where do you remember her from?" To which he replied, "Cleveland Avenue, the first one." (R. 59.) The prosecuting witness also asked petitioner by which door he entered her house and he replied that he entered by the back door (R. 60). The trial court heard evidence outside the presence of the jury concerning the voluntary character of the statements, but limited this examination to the events at the police station (R. 56-59).

The witness Clark testified that at the time of the offense he gave a ride to a person filling the description of the assailant and that the person was the petitioner (71-73). In the Montgomery County jail, on November 17, 1952, the witness confronted the petitioner and the petitioner acknowledged that he had been Clark's passenger (R. 74-75). Here again an examination concerning the voluntary character of the statement was limited to the immediate surrounding circumstances (R. 74).

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Dr. Bazar, a psychiatrist, testified that while he was examining the petitioner as to his sanity or insanity the petitioner confessed to him (R. 164-166). At no time did the trial court permit evidence of transactions allegedly occurring at Kilby Prison prior to the time statements were made.

Whether the trial court's action in these instances violated the petitioner's rights under the Fourteenth Amendment is thus presented.

(A) THE INCULPATORY STATEMENTS WERE NOT COERCED AS A MATTER OF LAW.

Although an original confession may have been obtained by improper means, later confessions may be admitted if the court believes from the length of time intervening or from other circumstances that the hopes or fears that prompted the earlier confession have been dispelled.

State v. Dreher, 166 La. 924, 118 So. 85; Cert. den. 278 U. S. 641, 73 L. Ed. 556;

Green v. Commonwealth, 83 S. W. 638, 26 K. L. R. 1221;

Lyons v. Oklahoma, 322 U. S. 596, 88 L. Ed. 1481, 64 S. Ct. 1208;

Whitten v. State, 86 Fla. 111, 97 So. 496, dismissed 267 U. S. 608, 69 L. Ed. 812;

Smith v. State, 74 Ark. 397, 85 S. W. 1123;

Mangum v. U. S., 289 F. 213;

Palakiko v. Harper, 209 F. 2d 75;

U. S. ex rel Weber v. Ragen, 176 F. 2d 579; Cert. den. 336 U. S. 969, 69 S. Ct. 930; *People v. Weber*, 401 Ill. 584, 83 N. E. 2d 297; Cert. den. *Weber v. State of Ill.*, 336 U. S. 969, 69 S. Ct. 930.

When the inculpatory statements were made (R. 59, 74, 75, 164-166) the petitioner was no longer under the influence of the alleged coercive circumstances. The statements were not made during the course of formal interrogation, but apparently came during ordinary conversation between petitioner and those to whom the statements were made. In the case of the statement of Dr. Bazar (R. 164-166) it was made during the course of his examination, not as to petitioner's guilt, but as to his sanity. The statements, other than one to Dr. Bazar were made in the Montgomery City Police Headquarters or the Montgomery County jail, while the alleged coercive treatment is said to have taken place at Kilby Prison. The statements to Dr. Bazar were made in his presence only and without the presence of any police or penitentiary officers (R. 164).

As was said in *Lyons v. Oklahoma*, 322 U. S. 596 at 603, 88 L. Ed. 1481, 64 S. Ct. 1208:

> "The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at the trial of his subsequent confessions under all pos-

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sible circumstances. . . . If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such uncertain situation that the confession should be admitted as voluntary, cannot be a denial of due process."

In *Lyons v. Oklahoma*, supra, some twelve hours had elapsed between the improperly obtained confession and the one introduced into trial. In the meantime the prisoner had been transferred from the custody of the sheriff to that of the warden. In that case also the court determined the voluntariness of the confession in the absence of the jury. The similarity to the case at bar is apparent.

In *People v. Weber*, 401 Ill. 584, 83 N. E. 2d 297, the prisoner objected to the introduction of a confession on the grounds that earlier ones had been obtained by coercive means. The Supreme Court of Illinois rejected this theory. The same point was brought up in this Honorable Court on petition for writ of certiorari; *Weber v. State of Illinois*, 336 U. S. 969, 69 S. Ct. 930, and in a petition for writ of habeas corpus; *U. S. ex rel. Weber v. Ragen*, 176 Fed. 2d 579, Cert. den. 338 U. S. 809, 70 S. Ct. 49.

Prior to the introduction of each of the inculpatory statements the State laid the usual predicate. Petitioner presented no evidence relating to any alleged coercion at the time and place of the statement

other than the fact that he was still in custody and without counsel. All of petitioner's proffered testimony related to events allegedly occurring in other places and at other times. This Honorable Court has held that the requirements of the Fourteenth Amendment do not place such a rule of evidence upon State courts which would require them to exclude a confession because it was obtained while a prisoner was uncounseled and illegally detained. *Stroble v. Cal.*, 343 U. S. 181; *Lisbena v. Cal.*, 314 U. S. 219; *Stein v. N. Y.*, 346 U. S. 156, 97 L. Ed. 1522.

We submit that testimony that the inculpatory statements were made at a place removed from the alleged coercion, to persons other than those alleged to have applied such coercion, many hours later, and in entirely different circumstances overcame any presumption that the statements were coerced. *State v. Guild*, 5 Halstead 163, 18 Am. Dec. 404; *State v. Moore*, 210 N. C. 686, 188 S. E. 421.

(B) THE TRIAL COURT'S ACTION IN LIMITING TESTIMONY CONCERNING THE INCULPATORY STATEMENTS DID NOT VIOLATE THE FOURTEENTH AMENDMENT.

Throughout the trial of the case at bar the trial judge limited the examination concerning the voluntary character of the inculpatory statements to the immediate circumstances surrounding the statements. This same procedure was followed in *Whitten v. State*, 86 Fla. 111, 97 So. 496. In that case the prisoner confessed to a private citizen while being held in jail pending trial. He objected to the intro-

duction in evidence of this confession on the grounds that prior confessions had been obtained by means of coercion. The jury was removed from the courtroom and counsel for the defendant offered to show coercion by the sheriff in obtaining the prior confessions. The trial court restricted the investigation to facts surrounding the confession in question only and would not permit counsel to go into the prior confession. The Supreme Court of Florida upheld the action and error to this Honorable Court was dismissed. *Whitten v. State of Fla.*, 267 U. S. 608, 69 L. Ed. 812. See also *People v. Kinney*, 202 N. Y. 389, 95 N. E. 756.

The preliminary determination of the voluntary character of a confession is, under Alabama rules, left to the enlightened discretion of the trial court and we contend that no abuse of this discretion is shown here.

Ex parte Fewell, ... Ala. ....., 73 So. 2d 558;

Dennison v. State, 259 Ala. 494, 66 So. 2d 552.

(C) THE ADMISSION OF THE INCULPATORY STATEMENTS DID NOT REQUIRE A REVERSAL OF THE CASE.

Apart from the inculpatory statements, there was ample evidence to sustain the verdict. The prosecuting witness was positive in her identifica-

tion of the petitioner (R. 60) and he was seen in the vicinity immediately after the crime was committed (R. 71). The trial court submitted the case to the jury with the following instructions (R. 175):

> "Now, as to any statement, or alleged confession or admission which may have been made, the weight of such statement or admission is for you and you alone, and you are to determine the weight and the credibility of the evidence here in the light of the circumstances that were existing at the time such statement was given."

In such a state of the record it cannot be held that the jury based its conviction on the inculpatory statement. This being true no error was committed in allowing the introduction of the statement.

Stein v. N. Y., 346 U. S. 156, 97 L. Ed. 1522;

Johnson v. State, 242 Ala. 278, 5 So. 2d 632, Cert. den. 316 U. S. 693.

We submit that the trial court did not erroneously apply the case of *Stein v. New York*, supra. In the *Stein* case the trial judge, as a preliminary matter, found the confession to be voluntary. The confession was then submitted to the jury for its consideration. After the jury had considered the evidence and returned its verdict of guilty there was a motion to set aside the judgment and verdict,

which motion was denied. This action added weight to the trial judge's determination of the voluntary character of the confession.

Under this state of facts the Majority in the Stein case held that in view of the fact that there was sufficient evidence to convict without the confession it made no difference whether the jury accepted the confession or rejected it.

As in the *Stein* case, supra, the trial judge in the case at bar made his preliminary findings as to the voluntary character of the confession and then submitted that confession to the jury with appropriate instructions. This, we feel, brings the instant case squarely within the holding of the *Stein* case.

PROPOSITION NO. II

THE LACK OF PROPORTIONAL REPRESENTATION OF NEGROES ON THE JURY DOES NOT CONSTITUTE DISCRIMINATION UNDER THE FACTS PRESENTED.

In his petition for writ of certiorari to review the judgment of the Supreme Court of Alabama, the petitioner contends that Negroes were systematically excluded from jury service in Montgomery County, Alabama, and that because of such exclusion he was denied "due process" in his trial and conviction for the crime of rape. Before he was placed on trial he filed a motion to quash both the indictment by the grand jury and the petit jury panel (R. 16, 20). Alleged systematic exclusion of Negroes from the jury rolls was the basis for this motion. The testimony of five witnesses was heard by the trial court on the motion (R.28-43). The motion was overruled and the trial proceeded. We submit that this ruling was not error and involves no denial of "due process" for the reason that the proof completely failed to show the systematic exclusion of Negroes from the jury rolls of Montgomery County, Alabama.

Mere allegations of discrimination are not sufficient in and of themselves to sustain such a contention and the burden of proof to show an alleged

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discrimination is on the one making the allegation.[1] This burden was not met by petitioner.

Two of the jury commission, viz., Eugene W. Carter, Circuit Judge, and John R. Matthews, Clerk of the Court, were called as witnesses for the petitioner in support of his motion to quash the venire. Judge Carter's testimony (R. 28-36) was to the effect that, although he did not know exactly how many names of Negroes were in the jury box, the jury commissioners have regularly endeavored to secure the names of qualified Negro citizens and have regularly placed the names of such citizens on the jury rolls. He testified that, in selecting citizens for the jury rolls, the identical qualifications are used in respect to both white and colored citizens, and that no Negro has ever been excluded on the basis of race or color. He testified that the jury box does contain the names of a good many Negroes, and that the jury commission has for the past several years regularly solicited the names of Negro citizens from Negro clubs and other sources in an effort to select and qualify as many Negro citizens as possible for jury service. He testified that, during his years of experience as a trial judge in Montgomery County, he has seen Negroes drawn for service on both grand and petit juries in that county.

The Clerk of Court, John R. Matthews, was called as a witness for the petitioner in his efforts

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[1] *Smith v. Mississippi*, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900; *Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402; *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

to establish the systematic exclusion of Negroes (R. 36-37). This witness testified that the jury commissioners have regularly secured the names of Negroes qualified for jury service from Negro churches and labor organizations, and that the witness has never seen a Negro excluded from jury service because of race or color. He testified that, on the contrary, if a Negro citizen possesses the qualifications requisite for jury service, his name has been placed on the jury rolls.

The prosecution called witnesses for the purpose of refuting the contention that Negroes have been systematically excluded from jury service in the said county. Circuit Judge Walter B. Jones, President of the Jury Commission since 1923, testified that the jury commission has never discriminated against Negroes (R. 37-39). He testified that the jury commission has made "countless efforts" to secure the names of qualified Negroes for jury service, and that more diligence has been exercised by the commission to secure Negro jurors than has been exercised to secure white jurors. He explained that on one occasion in 1943 a public mass meeting was held in Montgomery County for the express purpose of explaining the problem of securing enough qualified persons for jury service, and that qualified Negroes were particularly desired for jury service. Judge Jones testified that about 5,000 names are on the jury rolls of the said county and that the jury commission, in the selection of such names, has not even discussed or considered

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the question of race or color. He testified that the said 5,000 names are not identified, either on the jury rolls or in the jury box, as to race or color.

A Negro school teacher, J. J. Pierce, testified for the prosecution on the hearing on the motion to quash (R. 40-41). He testified that he, during the previous 8 or 10 years, has served on juries of Montgomery County, Alabama, upon at least six occasions, and that a member of the jury commission requested him to ascertain and submit to the commission a list of Negroes qualified for jury service. He testified that on one occasion, when he was called for jury duty, three other Negroes were also called, and on another occasion when Pierce was called two other Negroes were called (R. 41).

A Negro real estate dealer and lifelong resident of Montgomery County, D. Caffy, also testified on the hearing on the motion to quash the venire (R. 41-43). He testified that he has served on juries in Montgomery County, and that he was requested by a member of the jury commission to submit the names of Negroes qualified for jury service.

Petitioner attempts to show that only eight and one-half percent (8½%) of the members of any jury panel were Negroes while Negroes make up forty-three point six percent (43.6%) of the population of Montgomery County. The lack of proportional representation of races on the jury does not consti-

tute discrimination.[2] Inequality in the number selected does not in itself show discrimination. There must be present some design or purpose to discriminate, which may be shown by systematic exclusion of eligible jury men of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.[3]

In *Brown v. Allen*, 344 U. S. 443, 97 L. Ed. 469, 77 S. Ct. 397, the defendant contended that discrimination was proved by evidence that thirty percent (30%) of those eligible as jurors were Negroes while only seven percent (7%) of the names in the jury box were names of Negroes. A majority of the Court held that no discrimination against Negroes in the selection of the jury had been shown.

In Alabama, jury commissioners are required to place on the jury roll "the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character, and sound judgment; . . ."[4] There are numerous ex-

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[2]*Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276; *Thomas. v. Texas*, 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 383;*Cassell v. Texas*, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629; *Brown v. Allen*, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397; *Kennedy v. State*, 186 Tenn. 310, 210 S. W. 2d 132, cert. den. 333 U. S. 846, 92 L. Ed. 1129, 68 S. Ct. 659; *People v. Price*, 371 Ill. 137, 20 N. E. 2d 61, cert. den. 308 U. S. 551, 84 L. Ed 463, 60 S. Ct. 94.

[3]*Akins v. Texas*, supra, where the jury commissioners very carefully placed the name of one Negro on the jury panel.

[4]Title 30, Section 21, Code of Alabama 1940, as amended by Act No. 325, General Acts Ala. 1943, page 309.

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emptions from this mandate.[5] The petitioner here presented no testimony as to how many Negroes had been exempt by reason of Title 30, Section 3, Code of Alabama 1940, as amended, or how such exemptions might effect the ratio. In the absence of evidence to the contrary, there is a presumption or inference that officers in charge of the selection and summoning of the jury have performed their duty fairly and justly, without discrimination against any eligible class or race.[6] No evidence of such discrimination is presented here.

The case of *Cassell v. Texas*, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629, is no basis for reversal of the case at bar. In that case the majority opinion held in part as follows (at 291):

> "The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes in an area where Negroes made up so large a proportion of the population, proved the intentional exclusion that is discrimination in violation of petitioner's constitutional rights."

In the instant case there is no testimony that the jury commissioners "knew no eligible Negroes." To the contrary, the witness Carter testified ". . .I

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[5]Title 30, Section 3, Code of Alabama 1940, as amended by Act No. 243, Acts of Alabama 1943, page 197.

[6]*Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402, affg. 43 Fla. 446, 30 So. 685.

once went to the clubs, lists were made up of those who were willing to serve, and secured the first ones I put in there. Every time we got the names of a few negroes they were put in of course." (R. 28) He further testified that they had at least one-half the membership of one Negro club that he knew of (R. 34). He also testified that one Negro he recalled in particular had submitted to him the names of at least twelve Negroes which he presented to the commission (R. 29).

Another member of the jury commission, Judge Walter B. Jones, the Presiding Judge of the Circuit, testified to holding mass meetings for the purpose of obtaining names of Negroes and white persons for jury duty (R. 37-39).

Although the record indicates that the commissioners' acquaintenceships among Negroes were not so extensive as that among whites, the testimony shows conclusively that personal acquaintance was not the basis of selection. The record shows that every effort was made to obtain names of Negroes for the jury box and that no man had ever been turned down because of his race (R. 29, 34, 35, 37 and 38).

A further finding in *Cassell v. Texas*, supra, was that no more than one Negro was ever on a panel at one time.[7] This evidenced a design to limit

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[7]Concurring opinion of Mr. Justice Frankfurter.

the number of Negroes serving. In the case at bar varying numbers were shown to have served from time to time with some occasions where no Negroes served. We submit that there was no evidence of a scheme or plan to pay token tribute only to the requirements laid down by this court. Both grand and petit juries in Alabama are drawn from the box and no selection of names is permitted.[8] The evidence shows that the names were placed in the box and drawn therefrom without regard to race or color.

Respondent earnestly contends that the trial court's action in denying the motions to quash the venire and the indictment was rightly affirmed by the Supreme Court of Alabama. As was stated in *Akins v. Texas*, 325 U. S. 398, 401, 89 L. Ed. 1692, 65 S. Ct. 1276:

> "While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, (citing cases) we accord in that examination great respect to the conclusions of the state judiciary. Pierre v. La. 306 U. S. 354, 358, 83 L. Ed. 757, 760, 59 S. Ct. 536."

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[8]Title 30, Sections 30, 63, Code of Alabama 1940.

PROPOSITION NO. III

THE PETITIONER WAS NOT DEPRIVED OF DUE PROCESS BY THE ACTION OF THE TRIAL COURT IN EXCLUDING THE GENERAL PUBLIC FROM THE TRIAL PROCEEDINGS, AND ALLOWING THE PRESS, MEMBERS OF THE BAR, A STENOGRAPHER FOR THE BENEFIT OF PETITIONER, COURT OFFICIALS, AND PETITIONER'S FAMILY TO REMAIN.

During the petitioner's trial in the Circuit Court of Montgomery County, Alabama, and before the actual trial had begun, the trial court excluded the general public from the courtroom (R. 2, 10). The press, members of the bar, a stenographer for petitioner's benefit, relatives of the petitioner, and court officials were allowed to remain (R. 6, 12, 15, 22). The petitioner here contends that he was thus denied the due process of law guaranteed him by the Fourteenth Amendment (Petitioner's brief, page 39).

The petitioner was on trial under an indictment charging the offense of rape. His victim was a married white woman. Petitioner is a Negro.

In the exercise of its wise discretion the trial court ordered the courtroom cleared of spectators. It is expressly provided by constitution and statute in Alabama that the trial court may exclude the

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public in prosecutions for rape. Article 6, Section 169, Constitution of Alabama 1901, provides:

> "In all prosecutions for rape and assault with intent to ravish, the court may, in its discretion, exclude from the courtroom all persons except such as may be necessary in the conduct of the trial."

Title 15, Section 320, Code of Alabama 1940, contains the same provision.[9]

Therefore, by virtue of both constitution and statute, supra, it is within the discretion of the trial court to exclude the public from the courtroom where the court deems it necessary so to do in order to preserve decorum, to secure the administration of justice, or to facilitate the proper conduct of the trial.

We agree with petitioner that the right to a public trial is deeply rooted in our legal tradition,[10] and we also join with petitioner in abhoring "Star

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[9]"In all prosecutions for rape and assault with intent to ravish, the court may, in its discretion, exclude from the courtroom all persons, except such as may be necessary in the conduct of the trial; and in all other cases where the evidence is vulgar, obscene, or relates to the improper acts of the sexes, and tends to debauch the morals of the young, the presiding judge shall have the right, by and with the consent and agreement of the defendant, in his discretion, and on his own motion, or on the motion of the plaintiff or defendants, or their attorneys, to hear and try the said cause after clearing the courtroom of all or any portion of the audience whose presence is not necessary.

[10]Brief of Petitioner, pages 39-49.

Chamber" proceedings.[11]

However, petitioner has failed to distinguish between *secret* or Star Chamber proceedings, and a *public* trial in all respects except the exclusion of spectators.[12] A public trial "is the opposite of a secret trial or a trial in camera or at star chambers. In the very nature and necessity of things it was never contemplated that all of the public should be present or privileged to be present in order to constitute a public trial. Attendance was necessarily limited to the capacity of the courtroom accommodations, which, as is well known, is as often inadequate as otherwise. . . . Some of the public not actually engaged in the trial must be privileged or allowed to attend the trial to constitute it public, but no irreducible minimum has ever been proposed or named as yet."[13] The presence of a few newspaper reporters (allowed in instant case) practically assures a public trial, or at least a trial with publicity.

In addition, under the law,[14] in every criminal

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[11]Ibid, page 40.

[12]"Formerly . . . there were two kinds of trials, public and secret. Before they declared their independence in the Colonies and in England star chamber proceedings were of common occurrence, and it was to abolish and forbid secret or star chamber trials that called forth the provisions of the federal and state constitutions requiring public trials. Arbitrary and secret deprivations of life, liberty, and property were no longer to be tolerated." *Keddington v. State*, 19 Ariz. 457, 172 P. 273 (1918).

[13]Ibid, at 274.

[14]Title 13 §§ 261-263, Code of Alabama 1940.

case tried in an Alabama Court of record (The Circuit Court of Montgomery County of course included) the whole proceedings, including motions, questions to witnesses and their answers, rulings of the court and remarks by counsel or court, are stenographically taken down, and if the defendant is not satisfied with the verdict and desires to have the proceedings reviewed on appeal, he is furnished with a full transcript of all that transpired during his trial. "Thus all those things that were hidden within the walls of the courtroom and memories of the criminal triers before we had stenographers are now made public records, open to the inspection of all interested parties."[15]

The main case relied on by petitioner is *In Re Oliver*.[16] But in the *Oliver* case This Court condemned a trial under Michigan's one man "Judge Grand Jury" investigation where the "Judge Grand Jury" convicted the accused of contempt for statements made before him.[17] That this case has no resemblance to and is no authority for making unconstitutional the procedure in the instant case is,

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[15] *Keddington v. State*, supra, at 274.

[16] 333 U. S. 257 (1947), Brief of Petitioners, pages 40, 42, 47.

[17] *In re Oliver*, supra.

we submit, obvious.[18] In *Oliver*, the only persons allowed in the courtroom were the defendant and court officials.[19] Defendant there, was denied most of the rights that an accused has long been guaranteed by our constitutional system. Use of this case again shows petitioners failure to note the controlling distinction between a secret trial and a public trial in which only spectators are excluded.

An accused is entitled to a public trial[20] but "(b)y this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the

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[18] A comparison of the rights of the accused in *In re Oliver*, supra, and the instant case is revealing:

In re Oliver	*Instant Case*
1. Defendant allowed no counsel.	1. Defendant allowed counsel.
2. No right of cross-examination.	2. All rights of cross-examination of witnesses.
3. No confrontation by adverse witnesses.	3. Defendant was present during all of prosecution.
4. No public record of proceedings.	4. Complete record made of trial.
5. Press excluded.	5. Press allowed.
6. Family of defendant excluded.	6. Family of defendant allowed.
7. No jury.	7. Jury.
8. No right to produce witnesses for defense.	8. Right to present a complete defense as in any criminal trial.

On the one hand we have secret hearings, without a jury, in which the accused is questioned and convicted in a manner similar to that of the Inquisition. On the other hand, we have a public trial in all respects except the presence of disinterested spectators.

[19] *In re Oliver*, supra.

[20] Brief of Petitioner, page 41.

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community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light."[21]

The constitutional requirement of a public trial "is fairly observed, if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."[22]

In a prosecution for rape, the exclusion from the courtroom of all persons save litigants, witnesses, jurors, counsel, officials of the court, and representatives of the press is not an abuse of the trial court's discretion, and such exclusion does not deprive the defendant of due process of law in violation of the

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[21] 1 Cooley on Constitutional Limitations, (8th Ed.) 647. See Wigmore on Evidence, (3rd Ed.) §1835.

[22] *Cooley*, supra, at 647. *Robertson v. State*, 64 Fla. 437, 60 So. 118 (1912).

Fourteenth Amendment to the Federal Constitution.[23]

In a rape case there is no invasion of the defendant's constitutional rights in the exclusion, by order of the court, of all persons from the courtroom and trial, except court officials, despite the constitutional requirement that every defendant in a

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[23]*Reagan v. U. S.*, 202 F. 488, 44 L. R. A. (N.S.) 583, (9th Cir. 1913) (Conviction for rape in District Court of Alaska, courtroom cleared of all except court officials, witnesses, and members of the bar—Affirmed); *Melanson v. O'Brien*, 191 F. 2d 963, (1st Cir. 1951) (Order denying petition for writ of habeas corpus vacated on other grounds); *Sawyer v. Duffy*, 60 F. S. 852 (D. C. Cal. 1945) (Conviction in California court of exciting lust of child under fourteen. Court cleared of spectators—Affirmed); *Benedict v. People*, 23 Colo. 126, 46 P. 637 (1896) (Conviction in Colorado court of infamous crime against nature. Court cleared of all except court officials, members of bar, law students, witnesses, and defendant's family—Affirmed); *Commonwealth v. Blondin*, 324 Mass. 564, 87 N. E. 2d 455 (1949) (Conviction for rape in Massachusetts court. Court cleared of all except court officials, members of bar, witnesses, stenographers and members of press—Affirmed); *Keddington v. State*, supra, (Conviction in Arizona court of causing the dependency of a girl. Court cleared of all except court officials, member of bar, witnesses, family of accused, members of press—Affirmed); *Moore v. State*, 151 Ga. 648, 108 S. E. 47 (1921) (Conviction of rape in Georgia court. Court cleared of all except court officials, members of the bar, family of accused, members of press—Affirmed); *People v. Swafford*, 65 Cal. 223, 3 P. 809 (1884), (Conviction in California court of abducting a girl under age, for prostitution. Court cleared of all except court officials and persons connected with the case—Affirmed); *Robertson v. State*, 64 Fla. 437, 60 So. 118 (1912) (Conviction in Florida Court of manslaughter in causing the death of a young woman by causing her to miscarry or abort an unborn child. Court cleared of all except court officials, members of bar, witnesses, family of accused—Affirmed); *Sallie et al. v. State*, 155 Miss. 547, 124 So. 650 (1929) (Conviction for attempt to rape in Mississippi court. Court cleared of all spectators—Affirmed); See *Baker v. Utecht*, 161 F. 2d 304 (8th Cir. 1947) (Cer. den. 331 U. S. 856); *State v. Callahan*, 100 Minn. 63, 110 N. W. 342 (1907).

criminal prosecution be afforded a "public trial."[24] If the evidence is obscene or vulgar, the court, in the interest of public morality or to save the witnesses from embarrassment, may permit the presence only of court officials, jurors, witnesses, and others connected with the case, and may exclude the general public.

It must be remembered that in the instant case, the trial court acted under authority of Alabama constitutional and statutory provisions allowing exclusion of spectators in rape cases.[25] Accordingly, respondent does not rely only on case authority for allowing exclusion of spectators in trials of a salacious or disgusting nature, but also calls to the attention of this Honorable Court, the presumptions accorded favoring the constitutionality of state constitutional and statutory provisions.[26]

Seven states are listed by petitioner as having

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[24] *Hull v. State*, 232 Ala. 281, 167 So. 553 (1936); *Scott v. State*, 249 Ala. 304, 30 So. 2d 689 (1947); *Wade v. State*, 207 Ala. 1, 92 So. 101 (1921).

[25] See discussion, supra, page 31.

[26] *Everson v. Board of Education*, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 911, rehearing den. 330 U. S. 855, 67 S. Ct. 962, 91 L. Ed. 1297; *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 64 S. Ct. 1384, 89 L. Ed. 1725; *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 64 S. Ct. 474, 88 L. Ed. 635; *Davis v. Dept. of Labor and Industry of Wash.*, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246, rehearing denied 317 U. S. 713, 63 S. Ct. 438, 87 L. Ed. 567; *Wampler v. LeCompte*, 282 U. S. 172, 51 S. Ct. 92, 75 L. Ed. 276; *Toombes v. Citizens Bank of Waynesboro*, 281 U. S. 643, 50 S. Ct. 434, 74 L. Ed. 1088; *Gitlow v. State of New York*, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138.

constitutional provision or statutes which permit a trial judge to exclude spectators from some criminal trials of a salacious or disgusting nature.[27] There are an additional five states,[28] which by statute allow exclusion of minors during these trials. We submit that if it is constitutional for a trial court to exclude *minors* during a trial of a salacious or disgusting nature, then it is constitutional to exclude all *spectators* as in the instant case. The reason is obvious. In both situations persons are excluded from the courtroom; in both, it is done to protect the general public and/or to facilitate the proper conduct of the trial; in both, an accused is tried without whatever aid or injury the excluded persons might bring him.

Petitioner has not cited, nor have we been able to find one case in which a Federal court has held a state exclusion statute to be unconstitutional.[29] On the contrary a Federal Circuit has found such a statute not in conflict with the Federal Constitu-

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[27]Brief of Petitioner, page 45, note 60.

[28]Kentucky Revised Statutes, 1953 § 455.130; Revised Statutes of Maine, 1944. Chapter 100, § 25; Minnesota Statutes, 1953, § 631.04; General Statutes of North Carolina, 1943, § 15-166; Wisconsin Statutes, 1953, § 256.14. Some jurisdictions also allow exclusion of spectators during civil trials, notably Canada, which allows exclusion during filiation proceedings. A complete list of authorities for exclusion is given in the notes to § 1835, Wigmore on Evidence (3rd Ed.).

[29]In *People v. Yeager*, 113 Mich. 228, 71 N. W. 491 (1897), (cited in petitioner's brief pages 43 and 45) a Michigan court held a Michigan statute to be contrary to the state constitutional guarantee of a public trial.

tion.[30] There is also authority to the effect that the Fourteenth Amendment does not require that a trial in a state court be public.[31]

Petitioner asserts that the exclusion of the general public worked to his detriment in that he did not discover the presence on the jury of the chief of the Montgomery Reserve Police Force.[32] However, petitioner made his assertion about the juror during the progress of the trial (R. 172) and was offered a hearing by the trial judge in order to show any bias on the part of the juror (R. 173). Petitioner was unable or refused to offer any evidence of the juror's bias (R. 173). Since petitioner *did* learn of

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[30]*Melanson v. O'Brien*, 191 F. 2d 963 at 965 (1st Cir. 1951). There the court said "Presumably the trial justice acted pursuant to Mass. G. L. (Ter. Ed.) Ch. 278, § 16A, providing that, in the trial of certain sex crimes where the victim is a minor under eighteen years of age, 'the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.' We agree with the Supreme Judicial Court that such a state statute is not on its face a violation of the due process clause; and without further comment we refer to the full discussion by the Supreme Judicial Court on this aspect of the case. See 324 Mass. at pages 569-573, 87 N. E. 2d 455." (*Commonwealth v. Blondin*, cer. den., *Melanson v. Mass.*, 339 U. S. 984, 70 S. Ct. 1004, 94 L. Ed. 1387).

[31]*Baker v. Utecht et al*, supra. The Eighth Circuit there said " 'the failure to provide counsel . . . (is) a violation of the due process clause. . . . By contrast, however, the denial of the right to a public trial (in part of the proceeding), where the accused enjoys the benefit of competent counsel at every stage of the proceeding, does not ipso facto involve a violation of the due process clause and operate as a jurisdictional bar to a valid judgment of conviction.' " See *Falkowski v. Mayo*, 173 F. 2d 742 (5th Cir. 1949).

[32]Brief of Petitioner, pages 39, 47, 48, 49.

the jurors supposed membership in the Reserve Police Force, before the conclusion of the trial he was in no different position than he would have been had he learned of this any time after *voir dire*. That the presence of the general public would have caused him to learn of the juror's supposed membership in time to allow him to strike this juror on *voir dire* is at best sheer speculation.

Contrary to petitioner's assertion that he was injured by the exclusion of spectators, there is adequate grounds for the belief that he benefited by such exclusion. It is a well known fact that the general body of mankind looks with no favor or complacency upon the despoiler of young womanhood, and their attendance in mass upon a trial of this kind is often taken by the jury as a mandate to convict the defendant. Thus generally speaking, the psychology of the courtroom is against, rather than for, the accused, whether he be innocent or guilty.

Petitioner was given a public trial within the provisions of the Alabama Constitution. The Federal Constitutional guarantee of a public trial, if it applies to the states, is we submit, not to guarantee a wholly public trial, but to prevent a secret trial. A trial in which disinterested spectators are excluded but court officials, members of the bar, relatives of the accused, a stenographer for the accused, and members of the press are allowed is a far cry from the *secret trial* of the Star Chamber, the letter des catre and the inquisition.[33]

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[33]See discussion, supra, pages 31-34.

Great weight, we submit, should be placed on the publicity in fact resulting from the presence of members of the press throughout the trial. "(T)wo or three newspaper reporters, with ears attune to catch everything that may be said in the course of a trial by the court, by counsel and witnesses, and carefully watching every movement and action likely to effect the trial . . . would tend more to constitute a public trial than a house full of idlers and curious courthouse loungers. Protection from oppression or arbitrariness of the courts, its officers, and the prosecuting officer, will be assured so long as trained and discriminating newspaper reporters are present at the trial, keeping close and critical watch of everything done and said, for the purpose of publication in the daily press. A larger public is made acquainted with the salient facts of the trial, even while it is progressing, through the press than it is possible to reach through the open doors of the courtroom."[34]

"While disinterested attorneys and representatives of the press are not the exclusive representatives of the public, it is equally certain that they are not officers of court nor the representatives of the state as against persons accused of crime. The trial of a criminal case, conducted in [their] presence cannot be said to be a secret trial."[35]

Petitioner has not contended nor is there any

[34] *Keddington v. State*, supra, at 274.

[35] *Moore v. State*, supra, at 52.

evidence that the trial court did not act under authority of Alabama Constitutional provision. Therefore, this Court would have to find Article 6, Section 169, Constitution of Alabama, 1901, in conflict with the Federal constitution in order to reverse on this point.[36]

In view of the nature of the offense for which the petitioner was on trial, it was in the public interest to clear the courtroom. The trial judge acted pursuant to constitutional authority. Petitioner was not deprived of due process by the action of the trial court in excluding spectators from the trial proceedings.

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[36]Note the similar statutes of other states, listed supra, footnote 28 and in petitioner's brief page 45, note 60.

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CONCLUSION

Repondent has met the objections raised by petitioner. We submit that the confession or inculpatory statements introduced at the trial were not coerced as a matter of law; that the trial court committed no error in limiting the scope of investigation concerning the inculpatory statements to the circumstances immediately surrounding such statements; and that regardless of what weight was given the inculpatory statements by the jury none of the petitioner's constitutional rights were violated.

We further submit that there was no evidence showing the systematic exclusion of Negroes from the grand or petit juries in Montgomery County, Alabama, the place of trial. To the contrary, we contend that the evidence conclusively shows that the jury box was filled without regard to race or color.

Finally, we submit that petitioner was afforded a public trial as required by the Constitution of Alabama and of the United States. Therefore, we submit that the judgment below should stand affirmed.

Respectfully submitted,
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SAMUEL KAUFMAN, II
Of Counsel On The Brief

CERTIFICATE

I hereby certify that I have forwarded a copy of the foregoing brief to Hon. Jack Greenberg, Counsel for Petitioner, 107 West 43rd Street, N. Y. 36, N. Y. on this the ..... day of October, 1954.

.....

ROBERT STRAUB

Assistant Attorney General of Alabama
Counsel for Respondent

APPENDIX "A"

Through inadvertence the following was omitted from respondent's cross-designation of the record and hence does not appear in the printed transcript of the record. It should appear at page 52 of The Printed Record.

(R. 76) "Q Were you, or were you not, at home on the morning of July 28th?

A I was at home.

Q Did you see this defendant at your house that morning?

A It was shortly after noon, but I did see him.

Q What were you doing at that time?

A At the time I first saw him I was sitting in the room in a rocking chair in front of my vanity taking my hair down.

Q Were you living in a house or an apartment?

A In a house.

Q Was it a two story or one story house?

A One story.

Q Which room of the house were you in?

A In the front bedroom. That is the room (R. 77) to the right of the house on the front.

Q What time did you say you saw this defendant?

A I don't know exactly. It was probably around 12:15 when he entered the house.

Q How were you dressed at that time?

A At the time he entered I had on pants, a brassiere, a garter belt, and a robe or housecoat.

Q How did you first see him?

A Through the mirror. He was back at the door and I looked into the mirror and saw him.

Q He was standing in the door?

A Yes.

Q Did he say anything to you?

A No, he didn't.

Q Did you say anything to him?

A Yes.

Q What did you say to him?

A I said, 'Get out of here.'

Q What did he do then?

A He jumped across the room and grabbed me by the throat and my arm.

Q Will you just go on and tell the jury what happened after that.

A Well, I screamed and he tightened his hand on my throat and told me not to, quit screaming, shut up, and he choked me and made me take my panties off, and forced me back on the bed and raped me and raised up from the bed, and he says, 'you are not going to report this are you?'

Q Were you then on or off the bed?

A I was sitting on the side of the bed, and he still was holding me, and I said, 'if you will leave now I won't report it.' And then he started hitting me, and hit me several times, and hit me on this side of my face, really hard in the stomach when I bent over, and as I bent over he kicked me on the right side of my face and I fell beside the bed, partly on the bed, and I was dazed a little then and he left the room, and he came back in the room a second time, and when he came back in the room he had a hat he didn't have the first time he came in

there. And he started beating me again. And there was a towel across the back of the chair. Before he started beating me, he had
(R. 78) asked me for money, and my purse was on the bed. I says, 'it is in there.' And he said, 'get it.' And I opened my pocketbook and took out my billfold and took the money out of the billfold—there wasn't very much —and I handed him the money, and after he came into the room the second time he started beating me again, and took the towel off the back of the chair and just twisted it in his hand. And I was sort of down on my knees—he had hit me—and I saw the towel just as it was in front of my face and I jerked it away from him and threw it into into the corner, and he picked me up and threw me against the floor a lot of times, and caught me by the hair and banged the side of my head against the floor a lot of times. I remember him taking a package of cigarettes and matches. And the last thing I can definitely remember is seeing him in front of the dresser, but I don't know that anything was missing.

Q Did he have intercourse with you?

A Yes, he did.

Q I will ask you this. At the time he had intercourse, was he choking you?

A Yes, sir, he had his hand on my throat.

Q He had his hand on your throat the entire time?

A Yes. He had one hand on my throat and this hand up here. (Indicating) I couldn't reach him with my left hand. I couldn't reach his chest.

Q Did you fight at him during that time?

A Yes, sir, I did. I didn't fight too much.

Q Did you scratch him?

A I don't know if I did, or not. If I did, I wasn't conscious of it. I tried to and I broke two fingernails.

Q Did he beat you at all before the actual rape?

A He had hit at me and I dodged it, and then he choked me, just choked and held me."

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, certify that the foregoing testimony of Mabel Ann Crowder is a true and correct copy of such testimony beginning with line 21, page 76, and continuing through line 31, page 78, of the

original transcript of testimony in the case of *Jeremiah Reeves, Jr. vs. State* on file in my office.

Witness my hand and seal this the ..... day of October, 1954.

.....

J. RENDER THOMAS, *Clerk*
Supreme Court of Alabama

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